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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HERBERT P. RUSSELL, Petitioner

v.

CAPITAL ONE BANK, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Herbert P. Russell
120 Maria Avenue
Bedford, Ohio 44146
440-232-6738

QUESTIONS PRESENTED

1. Should the Court's holding that there is no absolute due process right to counsel in civil cases in Lassiter v. Dept. of Social Services, 452 U.S. 18, be reconsidered?

2. Whether the district court abused its discretion in failing to grant petitioner's motion under Fed. R. Civ. P. 60 to reverse its decision to award summary judgment on the civil counterclaim and dismiss his complaint.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Herbert P. Russell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit refusing to overturn the district court's order of summary judgment which held that the district court did not err in granting summary judgment for Capital One Bank.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in Appendix A to this petition. The unpublished opinion of the District Court of Northern Ohio Eastern Division appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on June 19, 2000. No petition for Rehearing was filed. This Court's jurisdiction is invoked under Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court, Northern District of Ohio, Eastern Division, had jurisdiction pursuant to Title 15 U.S.C..

On July 15, 1995 the petitioner and the respondent, hereafter referred to as Russell and Capital One respectively, entered into a loan contract. The amount was $19,000 with a 2% payment on the monthly balance.

In August 1997 Capital One informed Russell in writing that it was raising the payments to 3%. Russell called Capital One and it corrected its records to 2%. In October 1997 Capital One again informed Russell it was raising the payments to 3%. Russell sent Capital One a letter requesting it honor the loan terms. Capital One, in a letter dated November 19, 1997, agreed to do so and apologized. In December 1997 Capital One began billing Russell at 3% and continued to do so every month thereafter.

On November 30, 1998 Russell filed a complaint in federal district court for breach of contract and violations of the Consumer Credit Protection Acts of 1968 and amendments. Capital One filed a motion for extension of time to respond to the complaint on December 16, 1998. The motion was granted the next day without giving Russell the opportunity to object.

On January 21, 1999 a case management conference was held with the court's law clerk. Capital One filed its answer and a counterclaim. The law clerk instructed Russell to get a loan and pay off the balance owed to Capital One. Russell attempted to do so but was unsuccessful.

On January 29, 1999 Russell filed a motion for extension of time to answer the counterclaim which was due February 10, 1999. The court did not respond and Russell filed his answer on February 10th. The court then granted the extension until February 10th, its due

date.

On March 29, 1999 Capital One filed a second motion for extension of time until May 17, 1999. Russell objected to same April 1, 1999 and the court remained silent implicitly granting the motion.

On June 29, 1999 the litigants met with the judge assigned to the case. The court finalized arrangements for a trial order scheduling the case for September 20, 1999. The court stated it would review all the filings and reach a decision on the summary judgment motions within two to three weeks. The next day, some seven business hours later, the court, in a 23 page Memorandum of Opinion and Order, awarded summary judgment to Capital One on its counterclaim and dismissed Russell's complaint.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: this petition presents an unresolved issue of national importance - the protection of a pro se civil federal defendant's right to be heard in a meaningful manner; the judicial opinions below denied petitioner his due process rights under the Fifth Amendment of the United States Constitution.

In Powell v. Alabama, 287 U.S. 45, this Court wrote:

Even the intelligent and educated

> layman has small and sometimes no skill in the science of law.... He lacks both the skill and knowledge to prepare his defense even though he have (sic) a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him....
> If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

In Gideon v. Wainwright, 372 U.S. 335, this Court held that no accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel. In the instant case the lower court stated Russell "must still comply with the Federal Rules of Civil Procedure." (See Appendix B, page B19)

The effect of holding a pro se civil litigant to strict compliance with procedural rules are several. First, not only will this deter civil plaintiffs from proceeding, it will also deter those with meritorious claims who cannot get counsel from suing in the first place. If they do sue, their chances of winning are decreased. Second, a defendant with counsel may allege crucial facts a pro se defendant would not think to include in his pleadings. Further, pleadings drafted by counsel not only may be phrased more artfully, but also may allege viable causes of action which might not occur

to the pro se, or for that matter, to the court. The result is to place in jeopardy the one due process right that pro se litigants clearly have: the right to a meaningful opportunity to be heard.

In Haines v. Kerner, 404 U.S. 519, this Court granted pro se litigants the right to have courts liberally construe their pleadings. The pro se civil litigant's constitutionally protected interest is in a meaningful opportunity to be heard. The valuation of this interest includes not only the value of the underlying substantive claim, which he may be either prevented or deterred from bringing or to fully respond to a counterclaim, but the value of his 5th Amendment protected interests also.

This Court held in Lassiter v. Dept of Social Services, 452 U.S. 18, that there is no absolute due process right to counsel in civil cases. This means the pro se federal civil plaintiff or defendant who cannot afford to hire a lawyer must represent himself in order to have his day in court. Under these circumstances a plaintiff must either forgo a potentially meritorious complaint or a defendant the best defense while both must strictly comply with the rules of civil procedure.

Full compliance with the rules is a burden the pro se civil federal defendant cannot possibly achieve. This denies him the meaningful opportunity to be heard even with his pleadings liberally construed. The appointment of

counsel is needed to safeguard his due process and protected interest rights.

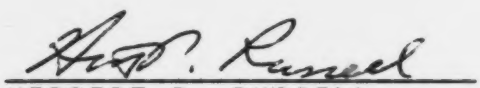
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Petitioner apologizes to this honorable Court for any procedural or substantive defectiveness in presenting this matter before it due to his layman knowledge.

DATED: September 2, 2000

Respectfully submitted,



HERBERT P. RUSSELL
Petitioner

No. 99-3951 App. A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HERBERT RUSSELL,	)	FILED
	)	
Plaintiff-Appellant	)	JUN 19 2000
	)	
	)	LEONARD GREEN,
v.	)	Clerk
	)	
CAPITAL ONE BANK	)	
	)	O R D E R
Defendant-Appellee	)	

Before: KENNEDY, NELSON, and BATCHELDER, Circuit Judges.

Pro se Ohioan Herbert P. Russell appeals a district court's summary judgment that dismissed his suit against Capital One Bank, his credit card company. The case has been referred to this panel pursuant to Rule 34 (j)(2)(C) Rules of the Sixth Circuit. We unanimously agree that oral argument is not needed. See Fed. R. App.P. 34(a).

Russell sued Capital One, claiming violations of federal statutes governing billing and debt collection; he also raised state law claims of breach of contract and intentional infliction of emotional distress. The district court granted summary judgment for the defendants, dismissed Russell's suit, and entered a judgment as a matter of law in favor of the defendants.

In his timely appeal, Russell argues that the district court erred in granting summary judgment for the defendants because the court misconstrued the terms of the lending contract between the parties. Both parties have filed briefs.

At the outset, we note that Russell has briefed only his breach-of-contract claim. Russell has abandoned his other district court claims by failing to brief them. See Fed. R. App. P. 28(a)(9); Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 259 (6th Cir. 1996).

We also note that, in his brief, Russell moves this court for summary judgment and a default judgment Neither motion is properly before this court. Thus, we deny Russell's motions.

We review de novo a grant of summary judgment. See Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc., 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The district court did not err by granting summary judgment in favor of the defendants. The parties do not dispute that Virginia law controls, as stated in the customer agreement.

Russell did not dispute the amount owed, he did not aver that the governing percentage--the London Interbank Offered Rate--had remained constant, or that he had made the required monthly payment. See Perez v. Capital One Bank, 522 S.E. 2d 874, 875 (Va. 1999). He instead maintains that Capital One's agreement not to change the servicing of his account bound Capital One to a two percent rate for minimum monthly payments, rather than the three percent rate adopted by Capital One in December 1997. Because the customer agreement between Russell and Capital One governed the obligations of the parties, see id., Russell was plainly in default. The district court did not err in granting summary judgment for Capital One.

For the foregoing reasons, Russell's miscellaneous motions are denied, and the judgment of the district court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

App. B

HERBERT P. RUSSELL	JUDGE PAUL R. MATIA
Plaintiff	CASE NO. 1:98CV2777
-vs-	
CAPITAL ONE BANK	MEMORANDUM OF OPINION AND ORDER
Defendant	

This matter is before the Court upon cross-motions for summary judgment (Doc. 9, 26); the plaintiff, Herbert P. Russell's motions for leave to file an amended complaint (Doc. 17); plaintiff's petition for a mandatory preliminary injunction (Doc. 22); and the defendant, Capital One Bank's motion to strike (Doc. 30). The Court has reviewed the plaintiff's memorandum in support of his motion for summary judgment and memorandum in opposition to the defendant's motion for summary judgment (Doc. 29); the defendant's reply memorandum in support of its motion for summary judgment (Doc. 31); defendant's memorandum in opposition to the plaintiff's motion for leave to file an amended compiaint (Doc. 21); plaintiff's reply to the defendant's opposition to his motion for leave to file an amended complaint (Doc. 23); the defendant's memorandum in opposition to the plaintiff's petition for a mandatory preliminary injunction (Doc. 27); plaintiff's memorandum in support of his petition (Doc. 29); and the plaintiff's

memorandum in opposition to the defendant's motion to strike (Doc. 32).

The plaintiff, proceeding pro se, brought this action under the Fair Credit Billing Act (FCBA), 15 U.S.C. SS 1666 et seq., the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. SS 1692-1692o and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. SS 1691 et seq. Also included were state pendent claims for breach of contract and intentional infliction of emotional distress.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when there is no genuine issue of material fact as to the existence of an element essential to the nonmoving party's case and on which the nonmoving party would have the burden of proof at the trial. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The genuine issue must be material; i.e., it must involve facts that might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Martin v. Ohio Turnpike Commission, 968 F.2d 606, 608 (6th Cir. 1992). The mere possibility of a factual dispute is not enough. Mitchell v. Toledo Hospital, 964 F.2d 577, 581 (6th Cir. 1992). The court must determine whether there is a need for a trial; in other words, whether there are genuine factual issues that properly can be resolved in favor of either party. Anderson v. Liberty

Lobby, Inc., 477 U.S. at 250. The evidence must be viewed in the light most favorable to the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment should not be granted to the moving party if reasonable jurors could find by a preponderance of the evidence that the opposing party is entitled to a verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. at 250; Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989).

The defendant, Capital One Bank, is a limited credit card bank located in Virginia. Its primary business is issuing credit cards. Prior to 1995, the plaintiff had a credit card issued by Signet Bank (Signet). In 1995, the defendant took over all of Signet's credit card accounts. All of the Signet credit card holders, including the plaintiff, were notified that upon expiration of their Signet cards, that card would be replaced with a Capital One Bank card. (Exh. 1). The plaintiff received a "Gold Mastercard" account with Capital One Bank. Each credit account entered into between the defendant and its customers incorporated a Customer Agreement. (Exh. 2). The Customer Agreement contained the following provisions:

> Making Payments: You promise to pay us all amounts due resulting from the use of your account, including any finance charges due under the terms of this Agreement...

You must pay at least the minimum payment shown on your statement. In any case, finance charges will continue to be assessed during billing periods that you carry a balance regardless of whether or not your statement shows a minimum payment due.

Variable Rates: Where and when variable rates apply to your account, the rate(s) may vary quarterly based on changes in the three (3) months London Interbank Offered Rate (LIBOR) published in the "Money Rates" section of the Wall Street Journal... If the periodic rate(s) and corresponding annual rate(s) increase, the finance charge will increase and your minimum payment may be greater.

Default: We may consider you to be in default under this Agreement if: (a) you fail to pay the minimum payment on time, or (b) you exceed your credit limit. To the extent permitted by law, you may also be in default if: (1) you violate any other terms of this Agreement, or any of the terms of any other agreement with us or any of our affiliates, or (2) you made any false or misleading statements on your application, or (3) bankruptcy or other insolvency proceedings are instituted by you or against you. After you are in default (or after we give you any notice of right to cure the default if required by law), we may

> restrict your account from new transactions, or close your account and demand immediate payment of the entire outstanding balance...
>
> If We Cancel Your Account or Suspend Credit Privileges. We may at any time, with or without cause and without advance notice, terminate this Agreement and/or temporarily or permanently suspend your credit privileges... Your obligations under this Agreement continue after your rights to obtain credit have been terminated or suspended.
>
> Changes in Terms: We may amend or change any part of your Agreement, including the periodic rates and other charges, or add or remove requirements at any time. If we do so, we will give you notice if required by law of such amendment or change... Changes to fees and other charges will apply to your account from the effective date of the change.

On or about July 15, 1995, the plaintiff received from Capital One Bank an offer to allow him to transfer balances from other accounts to his Capital One Bank credit card. The plaintiff accepted the offer of transfer and requested Capital One Bank to effectuate transfers from other accounts in the amount of $19,000.00. (Exh. 3). It is undisputed that the terms of the plaintiff's account required a minimum payment of 2% of the outstanding balance

each month. In August 1997, the plaintiff received his monthly account statement from Capital One Bank that included a notice that, effective as of the September 1997 billing period, the minimum monthly payment would be raised to 3% of the balance. (Exh. 5). The 3% increase was not included in the plaintiff's September 1997 Capital One Bank statement. But in defendant's October 1997 statement, the plaintiff was notified that the 3% increase would be effective with the December 1997 billing period. In October 1997, the plaintiff sent a letter to Capital One Bank notifying it that the impending minimum payment rate increase was in error. (Exh. 7). In response, the defendant sent the plaintiff a letter dated November 19, 1997 apologizing for any confusion along with a statement that the monthly payment is determined by the outstanding balance for each billing period and that the minimum was 2% of the new balance.

In December 1997, Capital One Bank began the new 3% minimum monthly payment rate that was reflected in the plaintiff's December statement. The plaintiff has refused to pay the full minimum monthly amounts due, nor has he paid past due fees.

Count 1 of the complaint contains the plaintiff's claim for violation of the FCBA. He alleges that after he received notification from the defendant that the minimum monthly payments would be raised to 3% of the balance he protested by letter and telephone and the defendant corrected its records.

But in October 1997, the defendant again notified him of the same change in payment. Following another protest by the plaintiff, the defendant informed him that it would permanently correct its records. Count 1 is based on the defendant's failure to correct its records in violation of the FCBA.

When a creditor receives notice from a debtor that his account statement contains a billing error, 15 U.S.C. S 1666 requires the creditor to do either:

> make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) ... or send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement...

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

The plaintiff sent a letter dated

October 19, 1997 to the defendant objecting to the raise in the minimum monthly payment. On November 19, 1997, the defendant sent him a letter apologizing for the confusion concerning the required payment and describing how the monthly payment was determined. In a January 1998 letter, the plaintiff stated that he received the November 19, 1997 letter, but the computer records have not been adjusted to ensure the 2% minimum payment. On March 30, 1998, the defendant sent plaintiff a letter explaining the reasons why it increased the minimum payment.

The FCBA requires a creditor to either correct the alleged error or send an explanation or clarification as to the reasons for its conduct. The defendant has complied with the FCBA and according to 15 U.S.C. S 1666(a), has no further responsibility. Thus, the allegations set forth in Count 1 of the complaint have no merit.

The plaintiff argues in his memorandum in support of his motion for summary judgment that the defendant violated the FCBA by reporting the delinquency without notification that the bill was in dispute. Even though this issue was not raised in the complaint, it will be addressed by the Court.

> After receiving a notice from an obligor as provided in section 1666(a) of this title, a creditor or his agent may not directly or indirectly threaten to report to any person adversely on the

> obligor's credit rating or credit standing because of the obligor's failure to pay the amount indicated by the obligor under section 1666 (a)(2) of this title, and such amount may not be reported as delinquent to any third party until the creditor has met the requirements of section 1666 of this title and has allowed the obligor the same number of days (not less than ten) thereafter to make payment as is provided under the agreement with obligor for the payment of undisputed amounts.

15 U.S.C. S 1666a(a).

As discussed above, the defendant satisfied the requirement of the FCBA by sending the plaintiff a letter of explanation as to why it increased the minimum payment. As long as the plaintiff was given at least ten days to make the payment, the defendant had the authority to report the delinquency.

15 U.S.C. S 1666a(b) prohibits a creditor from reporting a delinquency if, after sending the debtor an explanation for the content of the bill, the creditor receives written notice from the obligor that the amount is still in dispute within the time allowed for payment. There is no indication that the plaintiff timely notified the defendant after receipt of the March 30, 1998 letter that the account was still disputed. Therefore, the defendant was not obligated to inform any third party that was provided information of the plaintiff's

delinquent account that the delinquency was disputed.

Count 2 of the complaint contains the plaintiff's claim under the FDCPA. He alleges that after he sent letters to the defendant demanding that his records be corrected, the defendant began calling the plaintiff at unusual hours in violation of the FDCPA.

The purpose of the FDCPA is to eliminate abusive debt collection practices by debt collectors. 15 U.S.C. S 1692(e). The FDCPA defines "debt collector" as:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another...
>
> (T)he term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.

15 U.S.C. S 1692a(6).

The FDCPA does not cover a creditor collecting its own debt as long as the employee acting on behalf of the creditor does not indicate that he is working for a third party. Lewis v.

ACB Business Services, Inc., 135 F.3d 389 (6th Cir. 1998).

Capital One Bank is engaged in the business of extending credit. Any debt it attempts to collect is debt owed to it, not to another entity. The plaintiff admitted that the telephone caller identified herself as a Capital One Bank employee. Therefore, under the terms of the FDCPA, the defendant cannot be considered a debt collector. The FDCPA does not apply in this case.

Count 3 of the complaint alleges a violation of the ECOA. It concerns a letter sent by the defendant to the plaintiff dated May 20, 1998, wherein the defendant notified him that it canceled his charging privileges because his account was past due and/or over the limit. The plaintiff bases his ECOA claim on the facts presented in support of Counts 1 and 2.

The ECOA prohibits a creditor from discriminating against an applicant with respect to any aspect of a credit transaction because the applicant has in good faith exercised any rights under the Consumer Protection Act, 15 U.S.C. S 1691 (a)(3). A creditor has the right to make a rational decision about an applicant's credit qualifications. So an ECOA violation cannot be predicated on a creditor's attempt to collect a debt. Lewis v. ACB Business Services, Inc., 135 F.3d at 406.

Claims of discrimination under the ECOA are reviewed in the same manner as Title VII cases. Id. First, the

plaintiff must establish a prima facie case. In order to do so, he must show that (1) he engaged in statutorily protected activity; (2) he suffered an adverse credit action; and (3) a causal connection existed between the two. Id. An "adverse" action is defined in the ECOA as:

> A denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

The ECOA does not prohibit the defendant from refusing to extend additional credit under the existing credit arrangement under the circumstances in the present case. Furthermore, the ECOA does not include any action or forbearance relating to an account taken in connection with inactivity, default or delinquency as to that account. 12 C.F.R. S 202.2(2)(ii), Lewis v. ACB Business Services, Inc., 135 F.3d at 406. Because the plaintiff's account was delinquent or in default, the defendant did not violate the ECOA by canceling the plaintiff's charging privileges. The conduct of the defendant regarding the plaintiff's account was taken in connection with the default or delinquency of the

plaintiff's account. Therefore, the defendant is entitled to summary judgment as to Count 3 of the complaint.

The plaintiff's remaining claims, breach of contract and intentional infliction of emotional distress, as well as the defendant's counterclaim, arise under state law. A federal court has discretion as to whether to exercise jurisdiction over supplemental state claims where the federal question constituting the court's original jurisdiction have been dismissed. 28 U.S.C. S 1367(c)(3). In deciding whether to retain jurisdiction over state law claims, the court must consider interests of judicial economy, convenience, fairness and comity. Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996). The general rule is that when all federal claims are dismissed before trial, the state law claims should be dismissed as well. Id. The manner in which the federal claims are dismissed has different effects on the supplemental claims. The Sixth Circuit has noted that dismissal on a motion for summary judgment does not affect the court's ability to resolve supplemental claims. Id. at 1255.

The defendant's counterclaim is for breach of contract regarding the plaintiff's failure to pay the monthly minimum payments. Rule 13(a) of the Fed. R. Civ. P. provides that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." A compulsory

counterclaim does not need an independent basis for jurisdiction as long as it is ancillary to a federal claim. Harris v. Steinem, 571 F.2d 119, 121-22 (2nd Cir. 1978); Reid v. IBM Corp., 1997 WL 357969 (S.D.N.Y.). The defendant's counterclaim for payment of the plaintiff's account is logically related to the plaintiff's federal claims to be a compulsory counterclaim. A ruling in the defendant's favor as to the plaintiff's federal allegations may result in the further delinquency of the plaintiff's account. The interests of judicial economy and convenience allow this Court to exercise its discretion in retaining jurisdiction over the state claims.

The plaintiff's state claims have no independent basis for jurisdiction. However, his claim for breach of contract is related to the defendant's counterclaim and they should be decided together. In the interest of judicial economy and convenience this Court will also rule on the defendant's motion for summary judgment regarding the plaintiff's claim for intentional infliction of emotional distress.

The Customer Agreement governs the terms of the parties' relationship. It provides that as long as it gives sufficient notice, Capital One Bank could amend or change any part of the Agreement, including periodic rates and other charges. The plaintiff was given notice in October 1997 that the minimum monthly payments would be increased to 3% of the outstanding balance.

The plaintiff argues that he was promised that the minimum payment would always be a "low 2% or $10 whichever is greater." Letters sent to him describing how the monthly payment rate was calculated mentioned the 2% rate. The 2% rate was in effect with Signet Bank before Capital One Bank took over its accounts. At that time Capital One Bank stated in its notice of the change that customers of Signet Bank "will see no difference." Thus, the plaintiff contends that the 2% payment terms the plaintiff enjoyed for two years with Signet and which continued for two more years with Capital One Bank both implicitly promise a continuous 2% payment term that will never change.

When the plaintiff requested additional credit in the amount of $19,000.00 through the transfer of debt from four other creditors, he requested that his existing Capital One Bank credit account be billed. (Exh. 3). That account was controlled by the Customer Agreement which applied to the plaintiff who was not a new customer. Although the offer stated that the minimum payment would be 2%, the terms of the existing Customer Agreement provided for a change in minimum payment rates. The plaintiff has continued making minimum monthly payments at the 2% rate instead of the mandatory 3% rate. The Customer Agreement requires the plaintiff to pay at least the minimum amount shown on the statement. Consequently, the plaintiff is in breach of his contract with Capital One Bank. It follows that the defendant is entitled to summary

judgment on its counterclaim while the plaintiff's motion for summary judgment for breach of contract is without merit.

Count 4 of the complaint alleges intentional inflictional of emotional distress. Ohio adopted the tort of intentional infliction of emotional distress from the Restatement of the Law 2d Torts 71, Section 46 in Yaeger v. Local Union 20 Teamsters, Chaufers, Warehousemen, & Helpers of America, 6 Ohio St.3d 369, 374 (1983). The plaintiff must show that he suffered serious emotional or physical distress as a result of intentional or reckless conduct by another and such conduct must be extreme or outrageous. Id. The Ohio Supreme Court quoted comment to Section 46 of the Restatement at 73:

> "*** It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community

> would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 374-75.

Mere insults, indignities, threats, annoyances, petty oppressions or other trivialities are insufficient to prove intentional infliction of emotional distress. Id.

In order to recover for intentional infliction of emotional distress the Plaintiff must show that:

> (1) the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) the actor's conduct was so extreme as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) the actor's actions were the proximate cause of plaintiff's psychic injury and (4) the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it.

Tschantz v. Ferguson, 97 Ohio App.3d 693, 702 (Ohio App.8 Dist. 1994).

Severe emotional distress is defined as "emotional injury which is both severe and debilitating...(it is) found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress

engendered by the circumstances of the case." Paugh v. Hanks, 6 Ohio St.3d 72, 78 (1983). Some examples of serious emotional distress are traumatically induced neurosis, psychosis, chronic depression or phobia. Id.

The plaintiff alleges that the defendant's conduct has caused him to suffer mental distress, loss of sleep, anxiety and loss of credit. Injury from intentional infliction of emotional distress must be debilitating. There is nothing in the record showing that his emotional injury was disabling. A severe disabling emotional injury would require help to improve. He states in his affidavit that he has a history of depression which began in 1970. The Court notes that he has not recently been treated for depression. He did take a two week vacation in February 1999 to relieve the stress caused by the defendant. One telephone call and several letters informing the plaintiff that his minimum monthly payments would be raised does not amount to outrageous conduct. The defendant was acting in accordance with the Customer Agreement when sending the letters about which the plaintiff is complaining. Under the standards set forth by the law of the State of Ohio, the plaintiff's alleged condition is not serious. When a motion for summary judgment is made and properly supported, the adverse party may not rest upon the mere allegations of his pleading, but the adverse party's response, by affidavit or other authorized materials must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ.

P. 56(3). The plaintiff's claim for intentional infliction of emotional distress is without merit.

DEFENDANT'S MOTION TO STRIKE

The defendant has moved to strike pursuant to Rules 7(b) and 56(e) of the Fed. R. Civ. P. plaintiff's affidavits and exhibits attached to his memorandum in support of his motion for summary judgment and those attached to his memorandum in support of his petition for mandatory preliminary injunction.

The plaintiff cites Fed. R. Civ. P. 12(f) which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

He argues that the defendant's motion has not been timely filed in accordance with the 20 days time period set forth in Rule 12(f).

Examination of the language of Rule 12(f) shows that it relates only to pleadings. Rule 7(a) of the Fed. R. Civ. P. defines pleadings as including complaints, answers, replies to counterclaims, answers to cross-claims,

third-party complaints and third-party answers. Motions are not pleadings. Ernst Seidelman Corp. v. Molloson, 10 F.R.D. 426, 427 (S.D. Ohio 1950). Rule 12(f) is inapplicable to a motion to strike an affidavit or exhibit. Newsome v. Xenia City School District Board of Education, 1996 WL 1089865 (S.D. Ohio). Inadmissible affidavits or exhibits should be disregarded instead of stricken. Lombard v. MCI Communications Corp., 13 F. Supp.2d 621, 625 (N.D. Ohio 1998), citing State Mutual Life Assurance Co. of America v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979).

The defendant's motion to strike is actually based on the fact the plaintiff's exhibits and affidavits were not in accordance with the summary judgment standard set forth in Rule 56 (3). Supporting affidavits must be made on personal knowledge, setting forth facts admissible in evidence. Exhibits referred to in affidavits must be attached thereto. Rule 56(e).

Exhibits that have been properly made part of an affidavit may be considered. Brown v. Wal-mart Stores, Inc., 976 F. Supp. 729, 732 (W.D. Tenn. 1997). A document will not be admitted unless authenticated by and attached to an affidavit. Powers v. Runyon, 974 F.Supp. 693, 697 (S.D. Ind. 1997). The plaintiff's statement in his affidavit attached to his memorandum in support of his motion for partial summary judgment that the exhibits and the affidavit of his witness are true and within his own knowledge is insufficient to authenticate his exhibits. His

separate affidavit attached to the memorandum in support of his motion for summary judgment did not specifically refer to the exhibits in question.

Exhibit 19, attached to the plaintiff's memorandum in support of his motion for partial summary judgment is his wife's affidavit. She states that she was awakened at 7:00 a.m. on March 21, 1998 by a telephone call. Her husband became very upset and was yelling at the caller who he said was the defendant. Her statement as to the identity of the caller would be hearsay and inadmissible. The fact that the plaintiff asserts that he has a loudspeaker on his telephone and recording capability is ludicrous in view of the fact that his wife expressly stated that she did not hear the caller. Her statement that after that particular phone call, her husband has been continuously upset, lost a great amount of sleep and been depressed is inconsequential due to the Court's ruling that his claim for intentional infliction of emotional distress was without merit.

The plaintiff's affidavit, exhibit 20, is meaningless. In addition to his statements that the pleadings, exhibits and witness affidavit are true, he avers that the defendant's affidavit is contradicted by its website. He did not explain further. Specific facts are missing. Although the plaintiff is not an attorney, he must still comply with the Federal Rules of Civil Procedure. Schaefer v. Newton, 868 F. Supp. 246, 250 (S.D. Ind. 1994), aff'd.

57 F.3d 1073 (7th Cir. 1995). Therefore, the motion to strike is granted. In any event, even if his exhibits had been considered, with the exception of those duplicate exhibits of defendants, none of the remaining exhibits would make a difference in the Court's ruling.

MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

The plaintiff has moved for leave to file an amended complaint adding Signet Banking Corporation and Capital One Financial as parties and decreasing his causes of action to two, eliminating only the claim under the ECOA.

The Sixth Circuit has realized that where a motion for summary judgment has been granted, an amended complaint that could not withstand a motion for summary judgment would be futile. Workmon v. Publishers Clearing House, 118 F.3d 457, 459 (6th Cir. 1997). The two additional parties were not involved in the plaintiff's allegations. Adding them as parties would serve no purpose. The causes of action the plaintiff wishes to amend have been disposed of by summary judgment. The amended complaint would have no effect. Therefore, the motions for leave to file an amended complaint are without merit.

PLAINTIFF'S PETITION FOR MANDATORY PRELIMINARY INJUNCTION

Finally, the Court must consider

plaintiff's petition for mandatory preliminary injunction. In order to obtain a preliminary injunction, the plaintiff must prove: (1) the likelihood of success on the merits; (2) whether the injunction will prevent irreparable injury; (3) whether the injunction will harm others; and (4) whether the public interest would be served. Moltan Co. v. Eagle-Picher Industries, Inc., 55 F.3d 1171, 1175 (6th Cir. 1995). Based on the above discussion, the Court Finds that the plaintiff cannot show a likelihood of success on the merits. Therefore, the petition for a mandatory preliminary injunction is denied.

Accordingly, for the reasons set forth above, the plaintiff's motions for partial summary judgment, leave to file an amended complaint and to file an amended complaint and petition for a mandatory preliminary injunction are denied. The defendant's motion for summary judgment as to all counts of plaintiff's complaint is granted upon the grounds that there is no genuine issue of material fact. The defendant's motion for summary judgment on its counterclaim for breach of contract is granted. The Court is unable to determine the amount of damages the defendant is entitled to for the plaintiff's breach of contract. The defendant is hereby ordered to submit an affidavit to the Court within twenty days of this Order setting forth the actual amount owed to the defendant.

The Clerk of Court shall issue a copy of this Memorandum of Opinion and

Order to Herbert P. Russell, 120 Maria Ave., Bedford, Ohio 44146 and to Diane P. Chapman, Esq., Baker & Hostetler, 3200 National City Center, 1900 E. 9th Street, Cleveland, Ohio 44114-3485.

IT IS SO ORDERED.

JUDGE PAUL R. MATIA
CHIEF JUDGE
U.S. DISTRICT COURT

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.